marketplace terms, in essence, denies the public access to public telecommunications services. Congress and/or the Commission have consistently provided policy and regulatory support for the distribution of public service programming via broadcast, HDTV, cable, and direct broadcast satellite technologies. The majority's refusal to facilitate the distribution of public service programming via video dialtone -- particularly in the face of Congress' most recent directives to the Federal Government -- is an abrupt and unprincipled departure from well established Congressional and Commission public telecommunications policy.

III. THE COMMISSION'S ACTION IN THIS PROCEEDING IS ARBITRARY AND CAPRICIOUS

23. It is well established that an independent regulatory agency choosing to alter its regulatory course to effect a change in policy, as the Commission has done here, "must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored."[32/] This reasoned analysis must be based upon a consideration of relevant factors which are supported by the

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32/ Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987); citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2233 (1971); accord Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866 (1983).

record.[33/] In this case, the Commission's decision reflects an abrupt departure from well-established Congressional and Commission policy, and the record is devoid of evidence that the Commission considered relevant factors. Nor is there or any indication in the Report and Order that there is a legal impediment which prevents the Commission from requiring free or reduced rates for public television's utilization of video dialtone facilities.

24. The majority's entire explanation for what it ordered on the issue of free or reduced rates for public television is found in only a few short sentences. The principal explanation for denying APTS' and CPB's requested treatment is the desire "to achieve true equality of access rather than promote any particular voice or service provider."[34/] APTS and CPB agree with the Commission's goal to provide equality of access and not to provide any unfair advantage to any programmer. However, failure to afford accommodations for the delivery of public telecommunications services will result in inequality of access both to the service provider and end user. Public television cannot provide public telecommunications services to all Americans via video dialtone without significant subsidy of the

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[33/] Motor Vehicle Manufacturers Ass'n v. State Farm, supra; AT&T v. FCC, No. 91-1178, slip op. (D.C. Cir. Sept. 8, 1992); People of the State of California v. FCC, 905 F.2d 1217 (9th Cir. 1990) ("Computer III").

[34/] Report and Order ¶ 44.

charges for video dialtone services. If the Report and Order is not reconsidered, the result will be to deny both the public (particularly, those who cannot afford to pay) and the public programming provider access to these video dialtone services and, thereby, frustrate the Commission's nondiscriminatory access objective.

25. The Commission's discrimination-based explanation is also flawed because equality of access to commercial services in a video dialtone regulatory scheme is unaffected by subsidizing any particular voice or service. Common carrier facilities are available to accommodate all comers. If adequate facilities are not available, the Commission can order a carrier to provide such facilities.[35/] While unfettered access would still be available to all program providers, the Commission would not have addressed the critical barrier to achieving equality of access to noncommercial public telecommunications services: the inability of a free market to provide sufficient funding for development and delivery of public service programming.

26. Perhaps most damning to the majority's position is the fact that the decision lacks any record on which to support its change in policy toward access to public broadcasting. As discussed above, both Congress' and the Commission's policy has always ensured that the American public would have access to public television signals, regardless of what method is employed

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35/ 47 U.S.C. §214(d).

to deliver the signal. The evidence in the record unequivocally supports maintenance of the Commission's policy guaranteeing that the American public should have access to public broadcasting signals. Other than the majority's desire to further its "nondiscrimination objective," as discussed earlier, the Commission majority cites nothing in the record, or elsewhere, in support of its abrupt departure from established Congressional and Commission policy.

27. Finally, there is no legal barrier (and the Commission has cited no such barrier) to adopting a discriminatory rate policy to facilitate the distribution of public service programming via video dialtone. The United States Telephone Association Reply Comments erroneously state that the Communications Act prohibition against discriminatory rates prevents the Commission from granting the relief sought by APTS and CPB in their Comments.[36/] Under the Act, only unjust or unreasonable discrimination is prohibited.[37/] A Congressional mandate exists to make public television available through all distribution technologies, including video dialtone. Accordingly, any discrimination in favor of public telecommunications services is mandated by Congress, is in the public interest and could not conceivably be considered unjust or unreasonable. Congressional pronouncements in §396(h)(1) of the

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36/ See, Reply Comments of USTA at 14.

37/ 47 U.S.C. §202(a).

Communications Act which provides for free rates for interconnection services for public telecommunications services should put any doubts on this score to rest.

28. Moreover, the provision of free or reduced rates for video dialtone services for public telecommunications services would not harm common carriers in any manner. The carriers would be made whole by designing their rates and tariffs to take into consideration the required subsidization of public telecommunications services. The Commission's Lifeline and Link-Up America programs provide excellent examples of both a precedent and models for the establishment of a regulatory structure to ensure that both public service providers and the American public can access public service programming distributed via video dialtone service at no charge or at preferential rates; these models also reaffirm the right of common carriers to be fully compensated for their provision of service.[38/]

29. Based upon the foregoing, a reviewing court would overturn the Commission's decision as arbitrary and capricious, as the Commission failed to explain the rationale and factual

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[38/] Specifically, the Lifeline Program allows for a total reduction in fixed charges for telephone service to offset 100 percent of the federal subscriber line charge for low-income households. These programs are funded through charges paid by interstate ratepayers and reflect matching local rate reductions approved by state utility commissions.

The Commission's Link-Up America Program is designed to partially offset telephone installation charges. Eligible subscribers benefit from a government subsidy of up to $30 to offset half the charges for initiating telephone service and local telephone companies are encouraged to offer deferred payment plans for the remaining charges.

basis for its decision and did not pinpoint the factual evidence and policy considerations upon which it relied.[39/] The majority's rationale for its decision on the public telecommunications access issue is hardly sufficient to justify abandoning Congressional and Commission policy which mandate access for public telecommunications.[40/]

IV. CONCLUSION

30. It is most significant that the Report and Order fails to state the existence of any legal impediment to the Commission's taking the action requested herein. The Commission majority has simply chosen to adopt a policy that is not only violative of clearly enunciated Congressional policy, but which is also inconsistent with existing Commission policy. Furthermore, the Commission majority has not only failed to adequately explain the reasons for taking this course of action, but it has no record to support its position.

[39/] Bowen v. American Hospital Ass'n, 476 U.S. 610, 627 (1986); American Textile Manufacturers Institute v. Donovan, 452 U.S. 480 (1981); AFL-CIO v. Marshall, 617 F.2d 636, 651 (D.C. Cir. 1979).

[40/] While the general standard is that a reviewing court will set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," 5 U.S.C. §706 (2)(A) (1988), an examination of the recent trend in judicial precedent reveals that, "the Supreme Court will continue to set aside administrative action it deems unfair, whether or not the Administrative Procedure Act has been violated." Davis, Administrative Law of the 80's, §§6:35-6:39 at 221.

31. Models do exist to guide the provision of public telecommunications services on the video dialtone system at free or reduced rates. The FCC's Link-Up America Program and Lifeline Program provide precedent and models for the establishment of a regulatory structure to ensure that public service providers and the American public can access video dialtone, at no charge or at preferential rates. Unfettered access to public telecommunication services can be afforded in video dialtone, as it has been afforded in broadcasting and other emerging communications distribution technologies, if the Commission exercises the same foresight and enlightened policymaking that it has in the past.

WHEREFORE, for all the reasons stated herein, APTS and CPB respectfully urge the Commission to reconsider its Report and Order, and to take further action consistent with the views expressed herein.

Respectfully submitted,

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